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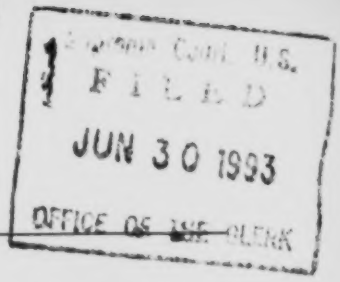

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THOMAS W. BERTHOLD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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June 30, 1993

QUESTION PRESENTED FOR REVIEW

Does the Due Process require the use of "actual loss" rather than "intended loss" to raise the base offense level under the Federal Sentencing Guidelines in Chapter 11 bankruptcy situation where the creditors were completely paid and the sole owner of the company, who is also the defendant whose offense level was raised, is the beneficiary of the bankruptcy estate receives a substantial return after the trustee's job was completed?

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No. 92-55765

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

THOMAS W. BERTHOLD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, THOMAS W. BERTHOLD, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit refusing to consider the use of the "actual loss" rather than the "intended loss" standard for raising the offense level under the

Federal Sentencing Guidelines. This petition for a Writ of Certiorari asks the court to clarify a dispute among the circuit who has given different answers in the use of "actual" vs. "intended" loss when there was no loss to anyone.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the district court's decision was not certified for publication, but appears in full as Appendix A to this petition. The order denying the Petition for Rehearing appears in full as Appendix B to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on January 28, 1993. (See Appendix A) A timely Petition for Rehearing was filed on February 17, 1993. The Court of Appeals' denial of the Petition for Rehearing was issued on April 1, 1993 and is set forth in

Appendix B. Therefore this court's jurisdiction is properly invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case primarily deals with the Federal Sentencing Guidelines, § 2F1.1 and Title 18 U.S.C. § 152(a). The Due Process clause of Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Thomas W. Berthold, was filed his Motion to Vacate and Set Aside or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 on May 26, 1992. The matter was properly referred to the trial and sentencing judge, the Honorable Harry L. Hupp, on May 26, 1992. On May 29, 1992 an order issued from the Honorable Harry L. Hupp denying appellant's motion. A timely notice of appeal

was filed appealing this ruling to the Circuit Court of Appeal in and For the Ninth Circuit.

On January 28, 1993, the Ninth Circuit Court of Appeals affirmed the lower court's ruling. A timely Petition for Rehearing was filed on February 17, 1993 and on April 1, 1993, the Court of Appeals denied of the petition for rehearing.

STATEMENT OF FACTS

On May 6, 1988, Taylor Bus Service, Inc., one of the largest school bus transportation companies in California, filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Petitioner was the president and sole stockholder and owner of Taylor Bus Service, Inc. Against the wishes of petitioner, a trustee was appointed to administer the debtor estate. During the course of administration of the estate, several conflicts arose between the appointed trustee and petitioner.

One of the conflicts concerned some real property in Vernon, California, which was used to store buses and other equipment and items belonging to Taylor Bus Service. Record title to the real property was held by petitioner, individually. This property was leased to Taylor Bus Service, Inc.

Under the terms of the lease, Taylor Bus Service, Inc. agreed to pay a monthly rent equal to the mortgage payments to petitioner and in addition to pay, when due, all real property taxes assessed against the premises.

Not long after the commencement of the administration of the bankruptcy estate by the trustee, petitioner became aware that mortgage payments on the property were not being made. Petitioner immediately discussed his concern about the bankruptcy estate's failure to pay rent with the trustee and/or his agent(s), and demanded rent so that he could make the mortgage payments. On at least one occasion, an agent of the trustee, informed appellant that the Chapter

11 trustee had no interest in the property, and no intention of paying rent or otherwise making payments on the property. When petitioner protested that the property was in danger of being lost to foreclosure, the agent replied, "Why don't you just sell the property?"

Thereafter, petitioner sold the property for approximately $1.7 million dollars. In open court, just two days after he sold the property, petitioner informed the bankruptcy judge and the appointed trustee of the sale.

After the sale, the trustee on behalf of the estate, made month to month rental payments to the new owner, but took the position that the proceeds derived from the sale were assets of the bankruptcy estate, and demanded that appellant turn over the proceeds. Appellant refused, maintaining that he was holding the money for the benefit of his creditors and employees.

The money from the sale was deposited in a brokerage account. The account statements were

mailed to the same address as the center of operations for Taylor Bus Service was located, and where the trustee had set up shop to administer the estate. The amount of the sale was supplied to the court by petitioner through his broker, in December of 1988.

The various disputes concerning the administration of the estate led to several injunctive bankruptcy court orders against appellant. Eventually, appellant was indicted for concealment of assets of a bankruptcy estate, and various violations of bankruptcy court orders.

At trial, appellant was not represented by counsel, nor was he represented by counsel at the time of sentencing.

During trial it became evident that the successful administration of the bankruptcy estate would eventually lead to the 100 percent payoff of all creditors of the estate, and that a substantial sum of money would be returned to appellant at the close of the estate.

Appellant was eventually convicted on six counts of the indictment. Additionally, the court made the finding that Taylor Bus Service, Inc. was the owner of the real property petitioner had previously sold. The court further found that the proceeds from the sale were assets of the bankruptcy estate.

During sentencing, the trial court found the base level of the violations of 18 U.S.C. 152(a) to be six, and ordered the sentences on several counts run concurrently. Two levels were added because of the finding the commission of the offense involved more than minimal planning. Nine levels were added, to make the total seventeen, because of the amount of money involved under Federal Sentencing Guideline section 2F1.1(b)(1). The nine level increase was imposed despite the fact that there was no actual monetary loss to the bankruptcy estate.

Thus, the increase in the amount of time movant received because of the amount of money involved was actually longer than the amount of

time received for the conviction on the base offenses.

Appellant's conviction was affirmed on appeal.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, there is a fundamental unfairness and violation of the petitioner's constitutional rights of due process under the facts of this case in that his offense level was raised nine levels using "intended loss" as the measure of the harm caused when in fact there was no loss to anyone and the petitioner himself was the sole stockholder and owner of the company.

Second, there is a conflict between the circuits that have considered the use of "intended loss" or "actual loss" as a measure of the damages in the event there is no loss to anyone. This court should take this opportunity to resolve the conflict and provide needed

guidance to the lower courts on the proper interpretation of the Federal Sentencing Guidelines.

I.

THE DISTRICT COURT ERRED IN IMPOSING A NINE LEVEL INCREASE IN THE SENTENCING LEVEL USING "INTENDED LOSS" AS A MEASURE OF THE DAMAGES WAS INCORRECT UNDER THE FEDERAL SENTENCING GUIDELINES.

Petitioner was found guilty of six counts of violating 18 U.S.C. 152(a). During sentencing, the trial court found the base offense level of petitioner's violations of to be six, and ordered the sentences to run concurrently. Two levels were added because of the finding the commission of the offense involved more than minimal planning.

The trial court then proceeded to consider the issue of actual harm to the bankruptcy estate in the context of whether or not the lack of actual harm would justify a downward departure. Thus, even though the court was of the opinion that there was no actual monetary

harm, the nine level increase for amount of money involved was made implicitly by a failure to consider the propriety of the increase itself and make a finding thereon before reaching the question of upward or downward departure.

The discussion was as follows:

Court: "I said that I've got an item I want to discuss with the government."

Defendant: "Oh."

Court: "Which may or may not lead to consideration of a downward departure. Which means that I'm going to find--means that I'm going to consider finding--unusual facts not taken into account."

Defendant: "No objection, Your Honor."

[The discussion further went]:

Court: "While it wasn't clear, of course, to the trustee the time the Soto Street property was sold that subsequent factors, the sale of the business, and whatever else was done, has led to a successful administration in the sense that all creditors are going to be paid off 100% and Mr. Berthold is going to get back a large chunk of money....if, in effect, that's true and accurate, what he's taken and not accounted for to the trustee, as he had a legal obligation to do, is going to turn out to be his own money. The increase of offense level by nine, because of the amount of money involved, assumes that the amount of money has been taken or at least attempted to be taken away from

> the person entitled--that's not quite the fact here. It may be ironically not the fact, didn't have to be the fact, but it is the fact that in effect that what he's gotten is going to turn out, in the end, to be his own money. Is this a reason to consider a downward departure?"

As the court may see, Nine levels were added to petitioner's offense level, making a total offense level of seventeen, because of the amount of money involved under Federal Sentencing Guideline section 2F1.1(b)(1) was based on "intended" loss and no "actual" loss..

Thus, the increase in the amount of time movant received because of the amount of money involved was actually longer than the amount of time received for the conviction on the base offenses.

In arguing that absence of harm was not a sufficient basis to justify a downward departure, the government expressly equated Berthold's actions with theft and robbery, saying:

> "Those creditors believed that they were stolen from. That is money that is rightfully due to them that they don't receive. It's the same as if

> Mr. Berthold had held them up at gun point and tried to take that money. A concealed asset is no different that other adjusted property."

In United States v. Kopp, 952 F.2d 1250 (3rd Cir. 1991), the court warned against precisely this type of confusion of guideline law concerning theft offenses as opposed to fraud or deceit offenses:

> Mechanical application of the theft guideline in fraud cases would frustrate the legislative purpose of the guideline and contravene the specific language of the commission. The sentencing guideline system was designed to sentence similarly situated defendants similarly: basing all fraud sentences on a simple 'amount taken' rule without regard to actual or intended harm would contravene that purpose [of the commission]. We think it plain that actual harm is generally relevant to the proper sentence. More importantly, congress has explicitly said so in 28 U.S.C.A. § 994(c)(3), West Supp. 1991, which directs the commission to take the nature and degree of the harm caused by the offense into account in its guidelines. See also United States Sentencing Guidelines, Section 1B1.3(a)(3). (Factors that determine guideline ranges include actual and intended harm).

The government cited United States v.

Nazifpour, 944 F.2d 472 (9th Cir. 1991) as holding that the amount concealed in bankruptcy is equal to the amount of intended loss. However, that court did not need to reach the question what dollar amount of harm resulted to the bankruptcy estate because there was some actual loss to in that case. The court thus used the total amount of a liquidated bank account in calculating amount of loss under section 2F1.1, and characterized it as intended loss.

In the instant case, the government attorney convinced Judge Hupp to impose the upward departure under section 2F1.1 on the basis of Ninth Circuit cases holding the enhancement can be based on intended, rather than actual loss. However, the judge should not have so hastily accepted the government attorney's interpretation of the law. Intended loss should be used only where actual loss is possible. The court in this case based the enhancement on intended loss, but intended loss

was not possible here.

The amount of loss used as the basis for a section 2F1.1 enhancement, if not measured by actual loss, must at the very least be a proven possibility. Petitioner submits United States v. Smith, 951 F.2d 1164 (10th Cir. 1991) as a case on this point and as a case in conflict with the current Ninth Circuit ruling. In that case, the defendant had obtained over $400,000 in loans from federally insured lenders by misrepresenting that his customers were making down payments on construction of homes. He was convicted on charges of aiding and abetting false statements to a federal insured lender. Despite the defendant's fraud on the banks, however, at the time of sentencing "[n]ot a single loan was in default." Smith at p. 1167. So, there was no actual loss. Nevertheless, the district court added a nine-level enhancement under Guidelines section 2F1.1 for a loss value over $400,000. The defendant appealed and the court of appeals ordered the enhancement

stricken and the sentence revised.

The district court in that case had erroneously adopted the probation officer's reliance on Application Note 7 to the section 2F1.1 Guideline. This note provides that valuation of loss involved in theft-related crimes may be based on "intended, attempted" loss if that amount is larger than the actual loss. The key word there was "attempted." No matter what the sentencing judge might believe the defendant intended by his actions, there must be shown on the record at least an attempt to inflict loss of a certain sum. There was no such evidence in Smith, nor is there any in the instant case.

The Court of Appeals in Smith acknowledged that "in the absence of actual loss, intended loss may be considered. . . However, the record must support by a preponderance of the evidence that the defendant realistically intended [a specific dollar amount of] loss or that a loss in that amount was probable." The Smith court

observed that putting the burden on the government to prove the amount of actual loss is "not onerous; " as "to the extent that [it] makes it a little more difficult for the government to obtain sentence enhancements under § 2F1.1, this does not seem to be cause for great concern. The government can obtain the basic sentence in any event. . . and if it seeks to enhance the sentence because of the size of the victim's loss, it is not asking too much for the government to be prepared to prove the actual amount of such loss." Smith at p. 1167.

Moreover, even if the "intended loss" figure is used, "it is a net value that must be used to measure loss. Any other approach ignores reality." Smith at p. 1167 (emphasis supplied). As the Smith court realized, there should be "some limitations on the unrestricted use of intent to establish loss." Smith at p. 1166, n.3.

The Smith court relied on the Tenth Circuit case United States v. Westmoreland, 911 F.2d 398

(10th Cir.1990) which decided as a matter of first impression whether "loss" under the theft guideline, section 2B1.1(b)(1) involves the total value of items taken in a theft or whether that amount should be reduced by the value of any items returned to the victim. Id. at p. 399. That court applied Application Note 2 to that section which provided that "if conduct is partially completed" or if a defendant is "apprehended in the process" of theft, then the value of items taken, without any reduction for value recovered by the victim, is the proper measure of loss.

However, those rationales does fit the circumstances in the instant non-theft case. Also the police do not have a fiduciary duty to recover items taken in a theft, because the victim cannot successfully recover civil damages from the police if their stolen goods are not returned. A trustee in bankruptcy, on the other hand, has a fiduciary duty to the creditors to manage the bankruptcy estate with ordinary

prudence and care. In re Bob Grissett Golf Shoppes, Inc., 50 Bankr. 598 (E.D. Va. 1985). No trustee can pay off creditors 100 cents on the dollar in a liquidation plan, as this was, unless there is substantial book value of assets in the company.

At the sentencing hearing, the prosecution also argued the Ninth Circuit has held that actual loss to the victim, the debtor estate is irrelevant. This was a legally imprecise interpretation of the guideline because the cases actually hold that the intended loss is only one aspect of the analysis involved in determining whether to apply the § 2F1.1 increase. Other cases interpreting the guidelines, the underlying federal statute through which the authority for their promulgation originates, and other specific guidelines make it clear, however, that the actual harm is at least as important as "intended harm" when determining whether to increase punishment level based on money

involved. (See 28 U.S.C. § 994 and United States Sentencing Guideline 1B1.3(a)(3).) That Guideline says that specific offense characteristics shall be determined on the basis of the following: "all harm that resulted from the acts or omissions specified in sections (a)(1) and (a)(2) above and all harm that was the object of such acts or omissions."

As noted above, conflicting with United States v. Nazifpour, 944 F.2d 472 (9th Cir. 1991) is United States v. Smith, 951 F.2d 1164 (10th Cir. 1991). In Smith the court, applying section 2F1.1 of the Federal Sentencing Guidelines, held the actual loss caused by the defendant should be measured by the net not gross value of what was taken. In that case, the court held that because the government had failed to prove that the lenders had suffered an actual loss, section 2F1.1 should not have been used to enhance the sentence. The court added that probable or intended loss also falls under section 2F1.1, but added that probable or

intended loss also falls under section 2F1.1, but added that the record lacked support for a finding that the defendant intended to cause loss in the full amount of the loans in issue.

In the instant case, there was no actual loss to the bankruptcy estate or to anyone else. If there was any loss, it was to the petitioner himself and no one else since he was the sole owner and stockholder of Taylor Bus Service, Inc. Therefore, there was no loss.[1] In United States v. Smith, supra, the court made clear that "it is a net value that must be used to measure loss. Any other approach ignores reality." The court also indicated that in fraud cases the threshold step is to look at actual loss. It is only where no actual loss is

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[1] The government attorney also conceded as much, although she later gave credit only to the trustee for the outcome: "I can't dispute the bulk of those facts. . . It's an extremely odd situation. I -- I certainly . . . wouldn't disagree with your honor on that. It's highly unusual for creditors to get paid a hundred cents on the dollar ($1.00). That's very rare."

calculable, that intended loss comes into play. Smith further said:

> "Our approach is consistent with the new commentary to Guidelines Section 2F1.1 promulgated by the sentencing commission to provide initial guidance with respect to the determination of loss. Guidelines, App. C, 224 (Nov. 1, 1991)."

The commentary specifically refers to fraudulent loan applications and contract procurement cases where the defendant's capabilities are fraudulently represented. However, the principal and purpose extend to appellant's case, since it too involves an application of Federal Sentencing Guideline § 2F1.1. In Smith, the ultimate conclusion was the defendant's correct offense level was six, which a Guideline range of zero to six months. In appellant's case, if the nine level increase is set aside as a correction of his sentence, movant's offense level would be eight, which would yield a Guideline range of two to eight months. Appellant has already served more than eight months, four of which can be apportioned

to his contempt convictions.

If the government has the burden of calculating an actual loss, and if no actual loss was established, the only remaining prong a nine level increase can stand on is an intended loss.

The same authority cited above makes it clear that if the increase in levels is based on the intended harm, the intentional element must be proven by a preponderance of the evidence. Here, there is substantial evidence that appellant never intended any loss. At many points in the trial transcripts, it is clear that appellant had a good faith belief that the trustee had legally and in a practical sense abandoned the property. Petitioner intended to save the value of a property which the trustee had exposed to foreclosure because the trustee refused to make the mortgage payments.

Although petitioner's put forth an "abandonment theory" by the bankruptcy trustee in a misunderstanding of 11 U.S.C. § 554 as a

legal defense, his expressions of the trustee's abandonment of the property go to the heart of the mens rea of the intentional aspect of "intending harm". Appellant truly believed he was saving the value of an asset which was being lost to foreclosure because the trustee refused to make the mortgage payments. Appellant believed that no one would benefit from a foreclosure sale on the property, particularly not creditors of the bankruptcy estate nor his 1300 former employees.

The very fact the trial court perceived appellant as acting out a "cock-a-mamy" theory, and believed appellant's expressions the trustee had abandoned the real property, evidences an actual finding by the court on the record that appellant did not intend harm. The court also expressed belief that appellant truly believed that the trustee divested himself of the property through operation of law by abandonment. Although not probative on the legal issue of whether the debtor estate had an

actual interest in the property, it is totally probative as to the mens rea aspect of whether appellant "intended" actual harm.

The facts in this case were such that, despite the "concealment" of assets the court found, there was no net intended, attempted, harm to the creditors. As the Westmoreland theft case held, "[t]o use intended loss as a basis for sentence enhancement, there must be some possibility, based on a preponderance of evidence in the record, that the intended loss could have been achieved." Id. (Emphasis added.) Given the bankruptcy trustee's fiduciary duty of care, there was no possibility of harm. Thus the use of intended loss of a dollar amount high enough to more than double the length of sentence appellant must serve beyond the base offense term is to perpetrate a miscarriage of justice.

The nine-level section 2F1.1 enhancement, reflected an imaginary 1.7 million dollar loss only, and was unjust because there was no

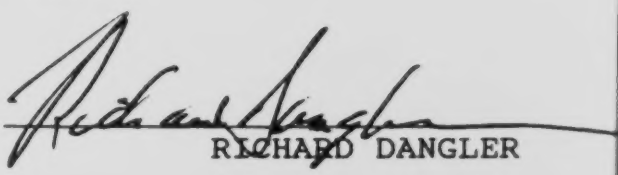
possibility of such a loss in this case.

CONCLUSION

The defendant's due process rights to a fair hearing and sentencing were violated with the court's improper use of "intended loss" in increasing the offense level nine levels. In this case the creditors were paid 100% of their debts and a substantial amount of money was returned by the bankruptcy trustee to the sole owner of the company - the petitioner. There was no loss to anyone - not to the creditors or to the owner of the company. Therefore, using an intended loss theory was a violation of petitioner's constitutional rights of due process.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit in this matter.

DATED: June 30, 1993



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APPENDIX A

United States v. Thomas W. Berthold, Opinion of the Court of Appeals for the Ninth Circuit, Case No. 92-55765, [Not Certified for Publication] (Issued January 28, 1993)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed
January 28, 1993

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS W. BERTHOLD, Defendant-Appellant.	No. 92-55765 DC No. CV 92-3140-HLH (CR 89-0862-HLH) **MEMORANDUM***

Appeal from the United States District Court
for the Central District of California
Harry Hupp, District Judge, Presiding

Argued and Submitted January 6, 1993
Pasadena, California

Before: BROWING, POOLE and NOONAN, Circuit Judges

Appellant appeals the district court's denial of relief under 28 U.S.C. § 2255 from his conviction for concealing assets and withholding documents from a bankruptcy trustee pursuant to

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

18 U.S.C. § 152. Appellant contends that the trial court improperly based his sentence upon intended rather than actual loss, that the evidence was insufficient to support the convicvtion, and that he was deprived of effective assistance ofcounsel at trial. We affirm.

FACTS and PROCEEDINGS

Berthold, the petitioner, was the principal of Taylor Bus, Inc. which filed for Bankruptcy under Chapter 11. The bankruptcy court appointed a trustee over the objections of Berthold. He subsequently sold a piece of property to which he held record title but for which Taylor Bus paid all expenses. He refused to turn the proceeds of the sale over to the trustee or reveal their location. Berthold was indicted for concealing assets of a bankruptcy estate and withholding documents from a trustee as well as on several counts of criminal contempt arising from his violent display of temper to the trustee's staff in violation of a

bankruptcy court order.

When Berthold's counsel withdrew the day trial was scheduled to commence, Berthold rejected all offers by, and suggestions of, the court and the prosecution for a continuance so that he might hire new counsel or better prepare the case himself. He elected to proceed to trial that day. The court continued the trial for one week at the close of the government's case but refused a further continuance when the defendant returned without making substantial effort to prepare his case.

The court found the defendant guilty on all charges except two of the criminal contempt counts. Through trial and sentencing Berthold continued to refuse to disclose in open court the location of the untraced proceeds of the sale. The court accepted the recommendation contained in the presentence report that defendant's base offense level be increased by 9 due to the amount of money involved in the fraud ($1.7 million). Berthold was sentenced to

24 months on the charges of concealing assets and withholding documents and thirty days on each contempt charge to be served consecutively.

On direct appeal Berthold, now represented by counsel, argued that the court had erred in not holding a competency hearing sua sponte, had abused its discretion in finding that Berthold had knowingly and voluntarily waived counsel, and had abused its discretion in not continuing the case during trial. This court affirmed the defendant's conviction and denied all subsequent motions. Berthold filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. The district court denied the motion on the grounds that all the claims contained in the motion were concluded by the judgment of conviction and affirmance on direct appeal.

DISCUSSION

Dismissal of Appeal

The government argues that this appeal should be dismissed because all of the issues raised by Berthold in his § 2255 motion were or

should have been raised on direct appeal. On direct appeal this court affirmed the district court's finding that the defendant waived his right to counsel. Berthold's claim that he was denied effective assistance of trial counsel re-examines the same issues. The sufficiency of the evidence and sentencing issues should have been raised on direct appeal. See Clark v. Ricketts, 958 F.2d 851, 855-56 (9th Cir. 1991), cert. denied, 113 S. Ct. 117 (1992); Brule v. United States, 240 F.2d 589 (9th Cir.), cert. denied, 354 U.S. 912 (1957). Failure to do so is a form of procedural default which generally precludes further review under § 2255. Egger v. United States, 509 F.2d 745, 748 (9th Cir.), cert. denied, 423 U.S. 842 (1975); Evans v. Mitchell, 458 F.2d 993 (9th Cir. 1972). All of Berthold's claims were or should have been raised on direct appeal.

In order to escape the binding effect of his earlier procedural default and the affirmance on direct appeal, Berthold characterizes his

arguments as founded in the Constitution and claims ineffective assistance of appellate counsel. Neither of these attempts succeeds in avoiding the default and affirmance. Berthold's argument that the district court improperly enhanced his sentence under U.S.S.G. § 2F1.1 rests only on a legal interpretation of the guideline. The petitioner does not claim that the sentence is cruel and unusual or based on an arbitrary distinction. His claim is not constitutionally based. Cf. Chapman v. United States, 111 S. Ct. 1919, 1927 (1991).

The Ninth Circuit has held that sufficiency of the evidence claims should not be considered under § 2255 unless the charges were "totally devoid of evidentiary support." Myers v. Rhay, 577 F.2d 504, 511 (9th Cir.), cert. denied, 439 U.S. 968 (1978); Rivera v. United States, 318 F.2d 606, 607 (9th Cir. 1963). The charges of which Berthold was convicted were not devoid of support.

While ineffective assistance of counsel

claims are generally appropriate for § 2255 review, Berthold's claim as to his trial is nothing more than a review of this court's previous holding that he knowingly and voluntarily waived his right to counsel. The court has the discretion to refuse to consider even a constitutional claim under § 2255 where previous review of the issue renders it an abuse of the writ. Walter v. United States, 969 F.2d 814, 816 (9th Cir. 1992). We refuse to reconsider this issue now.

Berthold offers ineffective assistance of appellate counsel as the cause for his procedural default in order to avoid dismissal of the appeal. To prove ineffective assistance of counsel the petitioner must show that he was prejudiced by his counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). To satisfy the deficient performance standard, the error must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment." Id. Berthold, in claiming deficient performance, lists objectionable conduct by his appellate counsel, including conflict of interest and abandonment. There is no record to support these accusations. Furthermore, petitioner makes no allegation as to how he was prejudiced by this alleged conduct.

Berthold is left only with his counsel's failure to raise the sentencing and sufficiency of the evidence issues on direct appeal. As discussed below, appellate counsel would not have succeeded had he raised these issues. Berthold thus does not "sustain his burden of proving ineffective assistance of counsel." Morrison v. Estelle, ___ F.2d ___, No. 92-15041 (9th Cir. Dec. 3, 1992).

Sentence Enhancement

Berthold argues that the sentence enhancement for amount involved in the fraud was improper because the creditors actually suffered no loss from his concealment of assets. The commentary following U.S.S.G. § 2F1.1, which

requires enhancement for any loss above $2,000, states that intended loss should be used to calculate the offense level if greater than actual loss. U.S.S.G. § 2F1.1 app. note 7. This court has recently reaffirmed that intended loss should control. United States v. Galliano, 977 F.2d 1350, 1352-53 (9th Cir. 1992). Using intended loss is particularly appropriate in cases such as this where the harm is limited due at least in part to the talents and efforts of a third party (i.e, the trustee).

Berthold claims that the trial court did not find that he actually intended the loss to fall upon creditors. The court found defendant guilty of "knowingly and fraudulently" concealing assets, see 18 U.S.C. § 152, a finding which includes a finding of intent. Furthermore, the court noted that while Berthold proclaimed an intent to pay former employees and creditors with the money, he offered no factual information to substantiate that intent. The district court correctly interpreted and applied

U.S.S.G. § 2F1.1.

Sufficiency of the Evidence

The standard for testing the sufficiency of the evidence is, considering the evidence in the light most favorable to the government, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The standard is satisfied in this case.

Berthold claims that he could not be convicted of concealing assets of a bankruptcy estate because the property he sold did not belong to the estate. The legal and equitable interests of a debtor which qualify property as part of a bankruptcy estate are defined by state law. Wilson v. Bill Barry Enters., 822 F.2d 859, 861 (9th Cir. 1987). It is not disputed that Berthold held record title to the property. Record title raises only a presumption of full beneficial ownership. It is a presumption which may be rebutted by clear and convincing

evidence. See Cal. Evid. Code § 662; Tannehill v. Finch, 188 Cal. App. 3d 224, 227, 232 Cal. Rptr. 749, 750 (1986).

The facts sufficiently overcame the presumption of Berthold's ownership arising from the record title. Taylor Bus made the downpayment on the property, made all the mortgage and tax payments, enjoyed all of the depreciation deductions, and listed the property as an asset in its records while Berthold did not include it as an asset on his tax returns or other personal records.

Berthold asks the court to consider "new evidence" along with these facts to find that the property was not an asset of the estate. The "new evidence" consists of a lease signed between Taylor Bus and Berthold and documents evidencing renegotiation of the mortgage on the property by Berthold. This evidence, necessarily in existence at the time of trial, was within the petitioner's knowledge and presumably his control. It can hardly be

considered "new". See United States v. Diggs, 649 F.2d 731, 739-40 (9th Cir.), cert. denied, 454 U.S. 970 (1981). Without deciding whether new evidence is generally cognizable under § 2255, the district court was correct in not considering the lease and loan negotiation documents.

Berthold further claims that the evidence does not support a finding that he "knowingly and fraudulently" concealed assets. Fraudulent intent generally can be inferred from the defendant's statements and conduct. See United States v. Clevenger, 733 F.2d 1356, 1358 (9th Cir. 1984). The facts are sufficient to permit an inference of intent on Berthold's part to conceal assets rightfully belonging to the estate. Only a portion of the proceeds went into accounts which were known to the trustee. Berthold did not make the trustee and the court aware of the sale of the property until after it occurred and continued to refuse to disclose the location of the remaining proceeds. He admitted

during argument in the district court that Taylor Bus owned the property he sold. His purportedly benevolent reason for not disclosing the assets does not negate the fraudulent intent. See United States v. Weinstein, 834 F.2d 1454, 1462 (9th Cir. 1987).

CONCLUSION

As this review of the evidence indicates, Berthold's appellate counsel would not have succeeded had he raised any of these issues on direct appeal. Any other issues raised by petitioner are also without merit. The petitioner does not satisfy the cause and prejudice standard which would excuse his procedural default. See United States v. Dunham, 767 F.2d 1395, 1397 (9th Cir. 1985). The above discussion also reveals the lack of merit in this appeal. The district court was correct in denying the petitioner's § 2255 motion.

The district court is affirmed.

APPENDIX B

United States v. Thomas W. Berthold, Opinion of the Court of Appeals for the Ninth Circuit, Case No. 92-55765, [Not Certified for Publication] Court of Appeals for the Ninth Circuit - Denial of the Petition for Rehearing (April 1, 1993)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed
April 1, 1993

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 92-55765
	)	
v.	)	DC No. CV 92-3140-HLH
	)	(CR 89-0862-HLH)
THOMAS W. BERTHOLD,	)	
	)	
Defendant-Appellant.	)	ORDER
	)	

Before, BROWING,POOLE and NOONAN, Circuit Judges

The panel as consituted in the above case has voted unanimously to deny the petition for rehearing.

The petition for rehearing is DENIED.